

**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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In the matter of: Young Scholars of Western Pennsylvania Charter School

NLRB Case 06-RC-210615

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**BRIEF IN SUPPORT OF THE EMPLOYER’S REQUEST FOR REVIEW AND  
REQUEST FOR A STAY OF THE DECEMBER 29, 2017 DECISION AND DIRECTION  
OF ELECTION**

The Employer, the Young Scholars of Western Pennsylvania Charter School (the “School” or “Employer” hereafter), hereby files with the National Labor Relations Board (the “Board”) this Brief in Support of its Request for Review and Request for a Stay of the Regional Director’s December 29, 2017 Decision and Direction of Election in the above-captioned election petition (the “Petition”) filed by the Pennsylvania Education Association, PSEA/NEA (the “Petitioner” or “PSEA” hereafter).

**I. Procedural Background.**

The PSEA Petitioner filed the above-referenced Petition with the Board on or about November 29, 2017. The Petition seeks an election to determine representation of a proposed bargaining unit of professional employees at the School. The School is a Pennsylvania public charter school organized and operated pursuant to the provisions of Pennsylvania’s Charter School Law, Act 22 of June 19, 1997, P.L. 225, *as amended*, 24 P.S. §§ 17-1701-A *et seq.* The School provides an elementary education program at a single school facility located in Baldwin Township, Allegheny County, Pennsylvania. The School was initially chartered in 2011. It is in its second charter renewal, and provides elementary education from kindergarten through 8<sup>th</sup>

grade. N.T. 17.<sup>1</sup> It currently has 310 students and uses technology and personalized instruction in its program, with an emphasis on foreign language instruction at the elementary grade level.

N.T. 17. The School currently has 59 full-time and part-time employees.

The School submitted its Statement of Position before noon on December 6, 2017. In its Statement of Position, the School requested the exclusion of certain Coordinator positions from the proposed bargaining unit on the grounds that these positions qualified as managerial. *See* Board Exhibit 3, Employer's Statement of Position. The positions challenged as managerial involve seven (7) employees in the following positions: (1) Title 1 Coordinator, of which there is one employee; (2) ESL Coordinator, of which there is one employee; and, (3) Cluster Heads/Coordinators, of which there are five (5) employees. In its Statement of Position, the School also disputed the eligibility of Christine Kostosky to vote on the grounds that Ms. Kostosky works as a special education paraprofessional, and paraprofessional positions are not included in the proposed professional employees' bargaining unit.

A hearing on the Petition was held at the NLRB's Region Six office in Pittsburgh on December 7, 2017, as provided in the Board's hearing notice. The parties were represented by counsel, and presented witnesses and evidence in support of their respective positions regarding the inclusion of certain positions in, and the exclusion of certain positions from, the proposed professional employees' bargaining unit. The parties agreed that certain positions will be included in the proposed bargaining unit, including teachers, assistant teachers, the school counselor, and the school nurse. *See* J. Ex. 1. The parties also agreed that a number of positions are excluded from the unit as supervisory, managerial, or non-professional, as identified in the parties' Joint Exhibit 1. At the conclusion of the December 7, 2017 hearing, the parties were

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<sup>1</sup> A hearing on issues related to the Petition was held on December 7, 2017. References to the Notes of Testimony of the December 7, 2017 hearing are to "N.T. \_\_\_\_."

granted permission by the Regional Director to submit post-hearing briefs to address the parties' positions with respect to the proposed professional employees' bargaining unit. The Regional Director granted the parties until December 14, 2017 to submit their post-hearing briefs.

On December 29, 2017, Regional Director Nancy Wilson issued the Decision and Direction of Election (the "Direction") that is attached as Exhibit "A" to the School's Request for Review. The Regional Director's Direction sets a date for the election for the proposed professional employee bargaining unit of Friday, January 19, 2018. With respect to the Coordinators' positions, the Regional Director deemed all of the positions to be non-managerial and directed that they be included in the proposed professional employees' bargaining unit. *See* Decision, pp. 3-8. With respect to Ms. Kostosky, the Regional Director determined that she was "unable to conclusively determine her status" and permitted her to vote, subject to the School's challenge at the election. *See* Decision, p. 11. Contemporaneously with the filing of this Brief, the School has filed with this Board: (1) a Request for Review of the Regional Director's Direction; and, (2) a Request for a Stay of the Regional Director's Direction.

## **II. Legal Argument.**

### **A. The Standard for Granting a Request for Review of the Regional Director's Decision and Direction of Election, and for a Stay.**

Pursuant to Section 102.67(d) of this Board's regulations, this Board will grant a request for review of a Regional Director's direction of an election only where "compelling reasons exist therefor." 29 C.F.R. § 102.67(d). Among the grounds for this Board to find compelling reasons for this Board to grant review is where there is a "substantial question of law or policy" that is raised because of an "absence of ... officially reported Board precedent" related to the issue for which the party seeks review. 29 C.F.R. § 102.67(d)(1)(i). With respect to this Board's authority to stay a regional director's order directing an election, Section 102.67(j) of this

Board's regulations provides that a party may request "expedited consideration" of the request for review and "a stay of some or all of the proceedings, including the election." 29 C.F.R. § 102.67(j)(1)(i), (ii). This Board's regulations provide that "[r]elief will be granted only upon a clear showing that it is necessary under the particular circumstances of the case." 29 C.F.R. § 102.67(j)(2).

**B. This Board should grant review of the Regional Director's December 29, 2017 Decision and Direction of Election -- and stay the election pending this Board's review.**

This Board is well-aware of the standard for determination of managerial status under the Act:

Managerial employees are defined as those who " 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.' " *NLRB v. Bell Aerospace Co.*, *supra*, at 288, 94 S.Ct., at 1768 (quoting *Palace Laundry Dry Cleaning Corp.*, 75 N.L.R.B. 320, 323, n. 4 (1947)). These employees are "much higher in the managerial structure" than those explicitly mentioned by Congress, which "regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary." 416 U.S., at 283, 94 S.Ct., at 1766. \*683 Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. See *id.*, at 286–287, 94 S.Ct., at 1767–1768 (citing cases). Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.

*N.L.R.B. v. Yeshiva Univ.*, 444 U.S. 672, 682–83, 100 S. Ct. 856, 862, 63 L. Ed. 2d 115 (1980)

(footnote omitted).

Notwithstanding that the National Labor Relation Act has been in effect for decades, this Board has only relatively recently determined – since 2012-- that it has jurisdiction of public charter schools, with its seminal decision involving public charter schools in the State of Illinois in *Chicago Mathematics & Science Academy Charter School*, 359 NLRB 455 (2012). In a 2016 decision, this Board applied the *Chicago Mathematics* decision to a Pennsylvania public cyber

charter school and affirmed that schools chartered under Pennsylvania's Charter School Law come within this Board's jurisdiction. *See The Pennsylvania Virtual Charter School and Pa. Virtual Charter Education Association PSEA/NEA*, 364 NLRB 87 (2016). Perhaps due to this Board's only relatively recent determination that it has jurisdiction of public charter schools, there is a lack of Board decisions regarding those positions in a public charter school's administration that qualify as managerial and, thus, must be excluded from a professional employees' bargaining unit.

By comparison, there is a considerable history of decisions issued by the Pennsylvania Labor Relations Board (the "PLRB") that have analyzed various administrative positions in Pennsylvania's public school system under the statutory definition of "management level employee" contained in Pennsylvania's Public Employee Relations Act ("PERA")<sup>2</sup> because the PLRB has exercised jurisdiction of representation petitions and unit clarification petitions involving employees of Pennsylvania's public school districts since PERA's enactment in 1970. PERA defines "management level employee" as "any individual who is involved directly in the determination of policy or who responsibly directs the implementation thereof and shall include all employees above the first level of supervision." 43 P.S. § 1101.301(16). Those PLRB decisions have recognized managerial status for positions similar to the Coordinator positions at issue here.

The Regional Director peremptorily dismissed any analysis of how the PLRB has treated the managerial status of positions in Pennsylvania's K-12 public school districts under PERA with the statement: "I am bound by Board law in making my determinations and therefore I will not address these cases." *See* Decision, p. 8. The Regional Director clearly erred in disregarding entirely the decisions of the PLRB that have examined the managerial status of Pennsylvania

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<sup>2</sup> Act 195 of July 23, 1970, 43 P.S. §§ 1101-101 – 1101.2201.

public school district administrative positions that are similar in their duties to the Coordinators' duties and, in the absence of precedent from this Board's on the managerial status of positions in public elementary school administration, the Regional Director's denial of managerial status to the Coordinators here presents compelling reasons warranting this Board's immediate review, and a stay of the Direction. While the Regional Director may believe that she is constrained not to rely on the decisions of a state labor relations board that has decades of experience in analyzing positions in its state's public school system that are analogous to the Coordinator positions at issue here, this Board is not so constrained, and may look to those PLRB decisions as persuasive authority for how this Board reviews managerial status under the Act.

Under the Pennsylvania Public Employee Relations Act, a school district's Title I Coordinator has been determined to have functions that have caused it to be excluded from the bargaining unit of professional employees that includes teachers. *See Butler Area School District*, 16 PPER ¶ 16126 (Proposed Order of Unit Clarification, 1985); *North Hills School District*, 12 PPER ¶ 12243 (Order Directing Election, 1981) (Title I Coordinator deemed appropriate for first-level supervisory unit). The School submits that the hearing evidence shows that the Coordinators' functions are similar the functions performed by faculty department chairs, which the Pennsylvania Labor Relations Board recently determined qualify as managerial positions under the definition of the statutory definition of "management level employee" under section 301(16) of PERA because they are involved, among other matters, in determining the school's policies. *See In the Matter of the Employees of Temple University*, 46 PPER ¶ 93 (Final Order, 2015).

The duties of the School's Title I Coordinator and the ESL Coordinator involve the administration of discrete federally-funded programs, and are properly excluded from this unit as

managers. The Pennsylvania Labor Relations Board's decision in *Bedford Area School District*, 23 PPER ¶ 23177 (Proposed Order of Dismissal, 1992), *aff'd*, 24 PPER ¶ 24069 (Final Order, 1993), is exactly on point as to these two positions. In *Bedford Area School District*, the Hearing Examiner found the district's Reading Coordinator was excluded from the professional employee's unit as a manager:

The reading coordinator is also management level employee within the definition of the Act. For example, the reading coordinator develops policy by planning and conducting inservice programs, by preparing student data and skills forms, and by preparing the Districts reading specialists handbook. Moreover, the reading coordinator also directs the implementation of policy through meetings and inservice programs developed by her. She also directs implementation of policy through meetings with the administration in which she discusses implementation of the remedial reading program. *See Pennsylvania Association of State Mental Hospital v. PLRB, supra.*

The reading coordinator, like the head teacher, functions both as a supervisor as well as a manager. As such, she shall be excluded from the unit as a managerial employee. *See Employees of Carlynton School District, supra* (employees who at times perform managerial duties are properly classified as managerial).

*Bedford Area School District*, 23 PPER ¶ 23177. The Hearing Examiner also concluded that the school district's federal projects coordinator, elementary gifted education coordinator, and the secondary gifted education coordinator positions were also properly excluded from the professional employee bargaining unit as performing managerial functions. *Id.* These findings were affirmed by the Pennsylvania Labor Relations Board. 24 PPER ¶ 24069 (Final Order, 1993)

Indeed, the Pennsylvania Labor Relations Board's hearing officer's application of PERA's statutory exclusion of "management level employee" in *Williamsport Area School District*, 26 PPER ¶ 26188 (Proposed Order of Dismissal, 1995), is a perfect analogy to the Cluster Coordinators' duties. The Hearing Examiner's decision described the duties of "department heads" as:



5. That the department heads are responsible for formulating budgets for their departments. They do so by soliciting from teachers a list of their needs and deciding which ones will be included in the budget. They submit their budgets to the superintendent or assistant superintendent who in turn submits them to the District's board of directors. When the board of directors cuts a budget, the department head decides where within the budget the cuts will be made. Department heads also monitor expenditures within their budgets. The departmental budgets for mathematics and social studies have ranged from \$23,000 to \$33,000 per year. (N.T. 18-19, 57-58, 75-77)

6. That the department heads are responsible for formulating changes to and for ensuring that teachers follow the curricula set for their departments. (N.T. 12-14, 31-32, 47-48, 55, 66-68, 78)

7. That the department heads decide how many sections of a course will be offered. (N.T. 15, 33-39, 42-43, 47, 50-51, 69-70)

*Williamsport Area School District*, 26 PPER ¶ 26188. The Hearing Examiner concluded that the department head positions qualified as “managers,” and explained as follows:

Section 301. As used in this act:

...

(16) 'Management level employee' means any individual who is involved directly in the determination of policy or who responsibility directs the implementation thereof and shall include all employees above the first level of supervision.

43 P.S. § 1101.301(16).

The Board will find employees to be management level when they exercise the kind of budgetary authority that the department heads exercise. *See Pennsylvania Association of State Mental Hospital Physicians v. Commonwealth*, PLRB, 124 Pa. Commonwealth Ct. 28, 554 A.2d 1021 (1989); *Twin Valley School District*, 26 PPER ¶ 26125 (Proposed Order of Dismissal, 1995). The Board will reach the same result when employees exercise the kind of authority over curriculum that the department heads exercise. *See Appalachia Intermediate Unit No. 8* (Department for Exceptional Children), 9 PPER ¶ 9111 (Nisi Decision and Order, 1978); *Twin Valley School District*, *supra*; *Bedford Area School District*, 23 PPER ¶ 23177 (Proposed Order of Dismissal, 1992); *Penn-Delco School District*, 19 PPER ¶ 19016 (Proposed Order of Dismissal, 1987). Accordingly, the petition must be dismissed. *See also Employees of Carlynton School District v. Carlynton School District*, 31 Pa. Commonwealth Ct. 631, 377 A.2d 1033 (1977) (employees need not exercise managerial authority at all times in order to be management level).

*Id.*



The School submits that the evidence from the December 7, 2017 hearing shows that the Coordinators qualify for managerial status and that the Regional Director clearly erred in finding otherwise:

**a. Cluster Head/Coordinators.**

The School created the position of cluster head/coordinators starting with the current school year in August of 2017. Ashley McCurry is the School's K-1 Cluster Coordinator. N.T. 19. She was offered, and accepted, this position through a contract dated August 23, 2017 that describes the duties and responsibilities for the K-1 Cluster Coordinator. N.T. 19; E. Ex. 1. In the 2016-2017 school year, McCurry served in the position of "Cluster Head (K-1)." See E. Ex. 2. Prior to the 2016-2017 school year, there was no "cluster head" position at the School. N.T. 143. The job description for her duties in the 2016-2017 school year as the K-1 Cluster Head included fourteen (14) enumerated responsibilities that were listed on one page. E. Ex. 2. When the position of K-1 Cluster Coordinator was created for the 2017-2018 school year, the listed duties expanded from fourteen (14) to thirty-one (31). N.T. 146. McCurry understood and agreed when she signed the three-page contract for the K-1 Cluster Coordinator position that these were the duties for the position. N.T. 144. She agrees that's the School's expectations for what the position of the K-1 Cluster Coordinator involve are listed in the position description. N.T. 148. She had the opportunity to ask questions from the School's Principal about what was required for the position, but she declined to do so. N.T. 144, 146. When the position changed from merely "cluster head" in 2016-2017 to "K-1 Cluster Coordinator" in 2017-2018, McCurry's compensation for those duties increased from \$2,000 to \$2,400 – a 20% percent increase. N.T. 147.

Adem Oksuz is the School's Chief Executive Officer and has been in that position since July 1, 2017. N.T. 15. Mr. Oksuz explained the reasons for the creation of the Cluster Coordinator positions: "we wanted to reduce our managerial workload in K through 1" and "to reduce administration's workload as a – as regarding some of these managerial duties from kindergarten through 1." N.T. 21-22. The "we" that Mr. Oksuz referred to is the School's CEO, the Principal, the Supervisor of Instruction and the Coordinator of Discipline. N.T. 22. The Cluster Coordinators are in charge of the instructional needs of their particular cluster; they meet with their cluster members each week and then meet with the School's other administrators to report back on matters related to the clusters. N.T. 22. In the School's organizational chart, the Cluster Coordinators are above the classroom teachers and below the top-level administrators. N.T. 24. The Cluster Coordinators recommend curriculum changes to Mr. Oksuz, who then would bring those recommendations to the School's Board of Trustees for approval. N.T. 24. "If there's a consensus with all of the Cluster Coordinators, we go with their recommendation" for curriculum changes. N.T. 25.

The Cluster Coordinators are responsible for giving informal evaluation feedback on the teaching performance of the other teachers in the cluster, which is taken into account by the School's certificated administrators when a teacher's formal evaluation is prepared. N.T. 25 -- 26. The Cluster Coordinators have authority to direct the teachers in their cluster "how to teach" and "how to discipline students." N.T. 29. They also have the authority to change the schedules of the School's assistant teachers. N.T. 29. There are five grade-level Cluster Coordinator positions whose job descriptions are essentially the same as the job description for Ms. McCurry's position as the K-1 Cluster Coordinator. *See* E. Ex. 3, 4, 5, 6. The School's

“expectations are the same” in terms of the duties to be performed by these grade-level Cluster Coordinators. N.T. 35.

The Cluster Coordinators also have responsibility for preparing the budget for their cluster. E. Ex. 1, p. 2; N.T. 27. This is a new responsibility that the School created when it created the positions as Cluster Coordinators. N.T. 27. The School collects budget information for the clusters through the Cluster Coordinators, and they will be responsible for “deciding what other things, supplies, textbooks, that [the School] will be buying for the cluster.” N.T. 27. The School does not begin preparing the next school year’s budget until April or May, which is then presented to the School’s Board for approval in June. N.T. 183. The School’s CEO “expects to rely” on the Cluster Coordinators’ budget recommendations when they perform this function in April or May of 2018. N.T. 184.

The Cluster Coordinators play roles in both effectively developing and implementing School policies. The Cluster Coordinators do not need to get approval from the School’s CEO over how they interpret and implement School policies. N.T. 29. As a specific example from the current school year, Mr. Oksuz developed a standard operating policy for when students are to be sent to the school nurse and what information should be communicated by the nurse to the classroom teachers. N.T. 182. Mr. Oksuz drafted this policy in response to the concerns raised during the Cluster Coordinator meetings. N.T. 182. He “shared it with them and I told them to give me feedback within two or three days to finalize it.” N.T. 183. He specifically provided a draft of this policy by email to Ms. McCurry for her to review (although she did not open it to review the policy). N.T. 155, 185.

**b. ESL Coordinator.**

ESL refers to English as a Second Language, and is instruction for English language learners. N.T. 36. ESL instruction is one of the differentiating features of the School, and is provided to 15 to 20 students this year, although the number of students receiving ESL instruction has been higher in other years. N.T. 36.

Rebecca Creasy is the ESL Coordinator and also the School's only current ESL instructor. N.T. 36-37. As the School's ESL Coordinator, Ms. Creasy represents the School at meetings of other ESL coordinators conducted by the Allegheny Intermediate Unit (AIU). She is responsible for ensuring that all legal requirements for ESL programs are being complied with by the School. N.T. 37. She is responsible to report to the School if teachers are failing to provide ESL instruction in accordance with the School's policies and the law regarding ESL. N.T. 38. If a teacher is not doing what they are required to do in terms of ESL instruction, then a teacher may face disciplinary consequences. N.T. 39. Ms. Creasy is the source of the information as to whether the School's teachers are providing ESL instruction in accordance with the School's policies and the law. N.T. 39. Ms. Creasy assists in drafting policies for the School's ESL program.

**c. Title I Coordinator.**

Title 1 refers to Title 1 of the federal Elementary and Secondary Education Act. The School receives special federal funding through the Title 1 program to provide intervention services to eligible students who need academic intervention or behavior intervention. N.T. 40. Christy Baldesberger is the School's Title I Coordinator. N.T. 40. As the School's Title 1 Coordinator, Ms. Baldesberger is in charge of drafting all of the School's Title 1 policies and

presenting them to the School's Board for approval, including the School's "parental engagement" and "school compact" policies.<sup>3</sup> N.T. 40.

Ms. Baldesberger is responsible for determining which students will receive Title 1 services, based on her review of student test data. N.T. 41. There are two School contracted teacher aides who report directly to her. N.T. 41, 83. Ms. Baldesberger is a certificated reading specialist and is involved in providing supplemental reading and writing services to students. N.T. 81. She prepares her own schedule for providing those services to students. N.T. 83.

The Regional Director also erred in determining that there was insufficient hearing evidence for her to determine the voting eligibility of Christine Kostosky. The hearing evidence shows that Ms. Kostosky performs paraprofessional duties and, therefore, should be denied eligibility to vote.

Ms. Kostosky began employment with the School this 2017-2018 school year. N.T. 44. She was given a specific employment contract and hired a "Behavior Specialist and [special education] Paraprofessional." E. Ex. 8. When she was hired, Ms. Kostosky was supposed to have her Behavior Specialist certification. N.T. 45. She lacks that certification, therefore she was assigned special education paraprofessional duties only. N.T. 45. The School asks the Director to conclude that Ms. Kostosky is ineligible to vote because she performs paraprofessional duties. It is not disputed by the PSEA that a paraprofessional would not be part of a professional employee bargaining unit.

Ms. Kostosky works with students who have behavior issues on a one-on-one basis most of the time. N.T. 45, 78. Teacher aides also perform similar one-on-one duties with students, the primary difference with Ms. Kostosky being that she can transition from one student to

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<sup>3</sup> The "school compact" is an agreement between the School and the family of the student who receives Title 1 services that describes the school's responsibilities and the family's responsibilities. N.T. 41.

another, whereas aids are assigned to a specific student. N.T. 45, 78. She also works with small groups of students who have behavioral issues. N.T. 78. She does not prepare Individualized Education Programs (“IEPs”) that a certificated special education teacher would prepare. N.T. 75, 152. Ms. Kostosky is not on the IEP team for Ms. McCurry’s students, which includes the special education teacher, the Principal, and McCurry. N.T. 152. The School submits that Ms. Kostosky’s duties are paraprofessional and that she should, therefore, be deemed ineligible to vote, and requests that the Board grant review of that aspect of the Regional Director’s December 29, 2017 Decision and Direction of Election.

### III. Conclusion.


WHEREFORE, the Employer, the Young Scholars of Western Pennsylvania Charter School, respectfully requests that the Board grant review -- and a stay of -- the Regional Director's December 29, 2017 Decision and Direction of Election<sup>4</sup> on the following issues:

- a. That the Regional Director erred in determining that the School's Title I Coordinator, ESL Coordinator, and Cluster Head/Coordinators lacked managerial status.
- b. That the Regional Director erred in failing to find that Ms. Kostosky performs paraprofessional duties and, therefore, is ineligible to vote in a proposed professional employees' bargaining unit.

Respectfully submitted,

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<sup>4</sup> The Regional Director also ruled that the School's Assistant Counselor and IT Specialist appropriately qualify for inclusion in the proposed professional employee bargaining unit. The School does not seek review of those determinations.